ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	DA 00-2324

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The Commission should refuse to adopt the four "punch list" items vacated by the United States Court of Appeals for the District of Columbia Circuit. As already explained in several rounds of comments to the Commission, the four features sought by the Federal Bureau of Investigation (and vacated by the Court of Appeals) are neither "reasonably available call-identifying information" nor consistent with the factors outlined in Section 107(b) of the Communications Assistance for Law Enforcement Act.

As such, the Commission has no justification for setting aside the industry's careful, technical interpretation of CALEA's requirements. As the Court of Appeals emphasized, the industry "safe harbor" standard for two-way voice telephony (J-STD-025) represents exactly the kind of technical expertise that Congress wanted to incorporate in CALEA standards, and which the Commission should overrule only when a clear showing of deficiency has been made. Because this standard is not deficient, the Commission should leave the standard unmodified and reject the FBI's four punch list items.

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The Personal Communications Industry Association ("PCIA")[1] respectfully submits its comments on the Commission's *Public Notice* in the above-captioned proceeding.[2] As described in greater detail below, PCIA continues to support J-STD-025 as the reasoned product of a comprehensive and exhaustive industry standards-setting process.

Consequently, and consistent with the decision by the United States Court of Appeals for the District of Columbia Circuit,[3] PCIA urges the Commission to leave the technical and operational requirements of J-STD-025 unmodified. The four additional "punch list" capabilities sought by the Federal Bureau of Investigation (and vacated by the Court of Appeals) are not

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[1] PCIA is an international communications association dedicated to advancing seamless global wireless communications through its public policy efforts, marketing programs, international events, and educational programs. PCIA members comprise a broad base of business sectors in wireless voice and data.

[2] Public Notice, *Commission Seeks Comments to Update the Record in the CALEA Technical Capabilities Proceeding*, CC Docket No. 97-213, DA 00-2324 (rel. October 17, 2000).

[3] *United States Telecom Association, et al. v. Federal Communications Commission*, No. 99-1442, slip op. (D.C. Cir. Aug. 15, 2000).

"reasonably available call-identifying information" and are not consistent with the factors outlined in Section 107(b) of the Communications Assistance for Law Enforcement Act.[4]

I. INTRODUCTION

On August 31, 1999, the Commission issued its *Third Report and Order* in this proceeding – requiring wireline, cellular and broadband Personal Communications Services ("PCS") carriers to implement six of the nine "punch list" capabilities requested by the FBI, despite unanimous opposition from privacy advocates, telecommunications companies, and private citizens.[5] The Commission also required that carriers implement a packet-mode capability, consistent with the industry safe harbor standard (J-STD-025).[6]

Subsequently, several privacy and industry groups – including PCIA – sought review of the Commission's *Third Report and Order* in the United States Court of Appeals for the District of Columbia Circuit. In a decision issued August 15, 2000, the Court affirmed the Commission in part and vacated and remanded in part for further proceedings. More specifically, the Court vacated and remanded four of the six punch list capabilities mandated by the Commission's *Third Report and Order*: "party hold/join/drop information on conference calls;" "subject-

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[4] Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified in 47 U.S.C. §§ 1001 *et seq.*).

[5] Third Report and Order, *Communications Assistance for Law Enforcement*, CC Docket No. 97-213, FCC 99-230 (rel. August 31, 1999).

[6] Telecommunications Industry Association & Alliance for Telecommunications Industry Solutions, Interim Standard, *Lawfully Authorized Electronic Surveillance*, J-STD-025 (December 1997) ("J-STD-025").

initiated dialing and signaling information;" "in-band and out-of-band signaling information;" and "post-cut-through dialed digit extraction."

The Court concluded that the Commission's decision to include these four capabilities reflected "a lack of reasoned decisionmaking."[7] The Court found that the Commission had: "never explained" its basis for concluding that these four capabilities were required by CALEA as call-identifying information; "identified no deficiencies" in J-STD-025's definition of call-identifying information;" not explained how its order would satisfy CALEA's requirements by "cost-effective methods" or how it would "minimize the cost of such compliance on residential ratepayers;" and failed to explain how post-cut-through dialed digits would "protect the privacy and security of communications not authorized to be intercepted."[8]

However, the Court did affirm the Commission's decision not to modify the packet-mode provisions of J-STD-025.[9] Because the Court upheld these provisions and have not remanded them to the Commission for further action, PCIA will limit its discussion to the four remanded punch list features, on which the Commission has sought comments.

II. THE COMMISSION SHOULD REJECT THE FOUR "PUNCH LIST" FEATURES SOUGHT BY THE FBI AND DEPARTMENT OF JUSTICE

PCIA has already filed several, detailed comments in this proceeding, objecting to the

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7 *United States Telecom Assoc.*, at 14-15.

8 *Id.*, at 15-18.

9 *Id.*, at 24.

FBI's punch list capabilities.[10] PCIA will not burden the Commission by discussing in any detail the arguments made in these previous filings. Instead, PCIA incorporates these previous comments by reference and encourages the Commission to review them (as well as the rather expansive record already before the Commission). In these comments, PCIA intends to focus on the two principal issues identified by the Court's decision.

A. J-STD-025 Is Not Deficient

In its decision, the Court repeatedly emphasized "CALEA's unique structure" and "the major role Congress obviously expected industry to play in formulating CALEA standards."[11] The Court noted that "[t]o ensure efficient and uniform implementation of the Act's surveillance assistance requirements without stifling technological innovation, CALEA permits the telecommunications industry, in consultation with law enforcement agencies, regulators, and consumers, to develop its own technical standards" and that CALEA prohibits law enforcement from dictating "the specific design of communications equipment, services or features."[12] As a result, the Court concluded that the Commission should generally be deferential to the technical expertise reflected in industry safe harbor standards: "[r]ather than simply delegating power to implement the Act to the Commission, Congress gave the telecommunications industry the first

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[10] *See, e.g.,* Comments of the Personal Communications Industry Association, CC Docket No. 97-213 (filed May 20, 1998); Comments of the Personal Communications Industry Association, CC Docket No. 97-213 (filed December 14, 1998); Reply Comments of the Personal Communications Industry Association, CC Docket No. 97-213 (filed January 27, 1999).

[11] *United States Telecom Assoc.*, at 16.

[12] *Id.*, at 7 (citing CALEA, §§ 107(a) and 103(b)(1)).

crack as developing standards, authorizing the Commission to alter those standards *only* if it found them 'deficient.'"[13]

This deference to industry-developed standards is fully consistent with CALEA and Congress' intent, as reflected in the legislative history accompanying the statute. As Congress repeatedly emphasized, "[t]he legislation provides that the telecommunications industry *itself* shall decide how to implement law enforcement's requirements," so that "those whose competitive future depends on innovation will have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services."[14] As a result, CALEA "allows industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly-available specifications creating 'safe harbors' for carriers."[15] Of course, Congress also gave the Commission authority to review industry standards, but, as the Court noted, the Commission was authorized to revise these "standards *only* if it found them 'deficient'" and only if its revisions satisfy the factors identified in Section 107(b).[16]

Here, the J-STD-025 – in particular, its definitions of "origin," "direction," "destination" and "termination" – is not deficient. To the contrary, J-STD-025's definitions are fully

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13 *Id.*, at 16 (emphasis added). *See also* CALEA, § 107(b).

14 H.R. Rep. No. 103-827, at 19 (1994) ("House Report") (emphasis added).

15 *Id.* This deference is also consistent with Commission precedent. Over the years, the FCC has wisely avoided attempts to develop technical standards through the unwieldy mechanism of public rulemakings. Instead, the agency has deferred complex technical standards to *fora* – such as PCIA's Paging Technical Committee or TIA's engineering committees – constituted precisely for those purposes.

16 *United States Telecom Assoc.*, at 16.

consistent with CALEA's definition of "call-identifying information"[17] and mirror the intent of Congress as expressed in CALEA's legislative history, which provides that "call-identifying information" is "the numbers dialed or otherwise transmitted for the purpose of routing calls through the carrier's network."[18]

Moreover, as PCIA has noted in its previous submissions, J-STD-025 reflects the "reasoned consensus" and combined expertise of the wireline, cellular and broadband PCS industries (as well as representatives of law enforcement).[19] As such, the standard – including its definitions – reflect current industry practice and the industry expertise that Congress wanted to incorporate in CALEA standards and only overrule when a clear showing of deficiency has been made. As noted by the Court, the Commission has "identified no deficiencies in the Standard's definitions."[20] In fact, the Court expressed considerable deference to these definitions, noting "CALEA's unique structure" and "the major role Congress obviously expected industry to play in formulating CALEA standards."[21]

Therefore, absent any clear evidence that the standard (or its definitions) is deficient, the Commission should refrain from substituting its judgment for industry's technical interpretation of these terms.

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17 CALEA, § 102(2).

18 House Report, at 21.

19 *See, e.g.*, Comments of the Personal Communications Industry Association, CC Docket No. 97-213, at 4 (filed May 20, 1998).

20 *United States Telecom Assoc.*, at 16.

21 *Id. See also id.*, at 6-7

B. The Four Punch List Features Are Neither "Reasonably Available Call-Identifying Information" Nor Consistent With The Factors Enumerated In Section 107(b)

In determining whether any of the four remanded features should be included in J-STD-025, the Commission must undertake a two-part analysis. First, the Commission must determine whether each feature is "call-identifying information" that is "reasonably available to the carrier."[22] Second, the Commission must ensure that the feature is consistent with the factors identified in Section 107(b) of CALEA:

> (1) meet[ing] the assistance capability requirements of [CALEA] by cost-effective methods;
> (2) protect[ing] the privacy and security of communications not authorized to be intercepted;
> (3) minimiz[ing] the cost of such compliance on residential ratepayers; [and]
> (4) serv[ing] the policy of the United States to encourage the provision of new technologies and services of the public.[23]

The Commission already has an extensive record before it, demonstrating that the four enhanced surveillance features sought by the FBI and the Department of Justice are neither "call-identifying information that is reasonably available to a carrier" nor consistent with the factors of Section 107(b). This is most clearly reflected in the punch list item with which the Court showed the greatest concern: post-cut through dialed digits.

As the Commission is aware, the "post-cut through digits" capability would require an originating carrier (such as a broadband PCS carrier) "to electronically monitor the communications channel that carries audible call content in order to decode all digits dialed after

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[22] CALEA, § 103(a)(2).

[23] CALEA, § 107(b)(1)-(4).

calls are connected or 'cut through.'"[24] As the Court noted, such post-cut through digits could be used for a variety of purposes, including interacting with: (1) information systems (e.g., accessing voice mail), (2) automatic banking services, (3) paging systems, and (4) calling card services.[25] In none of these scenarios are the post-cut through digits "call-identifying information that is reasonably available" to the originating carrier that completed the call. As far as the originating carrier is concerned, the call has already been completed, or "cut through" to the original destination (whether that destination was the caller's bank, voice mail system or interexchange carrier). Any post-cut through digits are simply content, passing over the circuit that the originating carrier established.

Because the call is already completed for purposes of the originating carrier, that carrier has no reason (and, hence, no current, technical capability) to access the post-cut through digits. This is especially true for wireless carriers, which do not use "tone decoders" in call processing. Switches detect dialed digits with a tone decoder or receiver; in wireline systems, these tone decoders are used at the beginning of a call to identify the number being dialed by the caller (as the digits are pulsed from the caller's landline phone). After setting up the call, the decoders drop off to handle a new call. In cellular and broadband PCS systems, however, tone decoders

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[24] *United States Telecom Assoc.*, at 18.

[25] *Id.* ("Some post-cut through dialed digits are telephone numbers, such as when a subject places a calling card, credit card, or collect call by first dialing a long-distance carrier access number and then, after the initial call is 'cut through,' dialing the telephone number of the destination party. Post-cut through dialed digits can also represent call content. For example, subjects calling automated banking services enter account numbers. When calling voicemail systems, they enter passwords. When calling pagers, they dial digits that convey actual messages. And when calling pharmacies to renew prescriptions, they enter prescription numbers.").

are not even used for call set up. Rather, the numbers are sent as a message burst after the subscriber hits the <Send> key. In order to access these post-cut through digits, therefore, wireless carriers would have to make major (and expensive) software and hardware modifications to their switches (including the installation of tone decoders that are otherwise unnecessary).

Moreover, even if the Commission considered such major modifications to be "reasonably available," the post-cut through feature is inconsistent with the factors enumerated in Section 107(b). First, mandating that carriers (especially wireless carriers) redesign their switches to capture such digits is extremely expensive. Unlike the other three punch list items (which mostly require software modifications), this feature requires extensive hardware modifications – the installation of additional tone receivers. With the typical decoder circuit costing several hundred dollars, this cost will be particularly burdensome in areas where the FBI has mandated large capacity requirements (for example, in New York, where the FBI has mandated that each cellular and broadband PCS carrier must be able to simultaneously monitor 181 calls).[26] The Commission has already determined that, based on aggregate revenue estimates from several manufacturers, the post-cut through digits feature would be the single most expensive punch list item – approximately 29% of the cost of the total punch list.[27] As such, implementing this feature hardly "minimize[s] the cost of [CALEA] compliance on residential ratepayers."

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[26] Final Notice of Capacity, *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act*, 63 Fed. Reg. 12,218, 12,288 (March 12, 1998).

[27] Third Report & Order, Appendix B.

Second, the post-cut through digits capability sought by the FBI is not the most "cost-effective" method of providing law enforcement with access to these digits. As PCIA noted in its previous comments, a law enforcement agency could always obtain a court order (e.g., a Title III order), allowing it to access the communications channel over which the digits are passing. The agency could then extract the post-cut through digits *itself*, using its own decoder.[28] While this approach would require agencies to purchase a few tone decoders (and, in some cases, obtain a leased line to convey the content – although, in many cases, the agency will already have obtained such a line), it would still be much less expensive and more efficient than requiring every switch in the nation to be overhauled to provide this punch list capability.[29]

Finally, mandating the post-cut through digits capability violates the Commission's obligation to "protect the privacy and security of communications not authorized to be intercepted." As the Commission and Court both recognized, a caller may dial digits after the initial call setup for a variety of reasons (some extremely private and personal, such as "to renew prescriptions,"[30] or "to access his/her bank statement."[31] There is no way for a carrier to

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[28] Comments of the Personal Communications Industry Association, CC Docket No. 97-213, at 33 (filed December 14, 1998).

[29] In fact, at most, the FBI estimated that it might cost law enforcement agencies up to $20 million per year to provide their own decoding. Reply Comments Regarding Further notice of Proposed Rulemaking by the Federal Bureau of Investigation and Department of Justice, CC Docket No. 97-213, at 64 (filed January 27, 1999). (Again, however, this cost mostly assumes that a law enforcement agency will have to obtain a leased line for just this purpose, which will not always be the case). In contrast, the Commission's own expense estimates (which did not include estimates from one of the largest manufacturers – Ericsson) concluded that, at a minimum, this punch list feature would cost $121 million. Third Report and Order, Appendix B. With Ericsson's expenses included (one of the largest manufacturers), this cost might increase by another fourth.

[30] *United States Telecom Assoc.*, at 18.

differentiate post cut-through digits that are credit card or bank account numbers from telephone numbers dialed after connecting to an interexchange carrier (which the Commission considers call-identifying information). Since the content (credit card numbers) cannot be distinguished from what the Commission views, wrongly, as call-identifying information for the originating carrier (telephone numbers dialed to allow the interexchange carrier to connect the call), the most valid protection is to require law enforcement to obtain a Title III order. Contrary to the government's claims, obtaining a Title III order to access the post-cut-though digits would not impose a particularly burdensome procedural obligation on law enforcement. In fact, law enforcement has had to do the same thing (obtain a Title III order) for pagers ever since the Fourth Circuit's decision in *Brown v. Waddell*.[32] Similar to post-cut through digits, law enforcement had sought to access digits displayed on a digital-only pager under a pen register order (claiming that the digits were call-identifying information). The Fourth Circuit disagreed, determining that a law enforcement agency must obtain a Title III order to access the displayed numbers because they could reflect the content of communications (even though the digits might, as law enforcement claimed, reflect the phone number of the party calling the paging subscriber).

III. CONCLUSION

Based on the foregoing reasons, the Commission should reject the four remanded punch list items. The J-STD-025 (in particular, its definition of "call-identifying information") is not

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(...Continued)

31 Third Report & Order, ¶ 119.

32 *Brown v. Waddell*, 50 F.3d 285 (4th Cir. 1995).

deficient. Moreover, the four punch list features are neither "reasonably available call-identifying information" nor consistent with the factors identified in Section 107(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, L. Benjamin Ederington, an attorney in the law firm of Steptoe & Johnson, LLP, hereby certify that I have on this November 16, 2000 caused to be served by first class mail, postage prepaid, or by hand delivery, a copy of the foregoing Comments on FCC Public Notice to the following:

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